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**IN THE
COURT OF APPEALS OF INDIANA**

HUGO MEDINA,)
)
Appellant-Petitioner,)
)
vs.) No. 49A04-0801-PC-10
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila Carlisle, Judge
Cause No. 49G03-0403-PC-046331

June 3, 2008

BAKER, Chief Judge

Appellant-petitioner Hugo Medina appeals the denial of his petition for post-

conviction relief, claiming ineffective assistance of trial counsel. Specifically, Medina argues that his counsel was ineffective for failing to object to the admissibility of the child molestation victim's pretrial statement in light of the United States Supreme Court's ruling in Crawford v. Washington, 541 U.S. 36 (2004), regarding the right to cross-examination. Medina also makes a separate claim that his trial counsel was ineffective for failing to challenge the reliability of the victim's statements, and argues that his trial counsel was ineffective for failing to object to the nature of the State's leading questions to the victim on direct examination at trial. Concluding that the post-conviction court properly denied Medina's request for relief, we affirm.

FACTS

The facts underlying Medina's conviction for child molesting, a class A felony, as found by this court on direct appeal, are as follows:

On March 18, 2003, Medina was temporarily living with his half-brother Carlos Blanco and Blanco's family, including nine-year old M.V. On the night of March 18, 2003, Medina entered the bedroom in which M.V. and her three-year old sister slept, removed M.V.'s clothing, and placed his mouth on M.V.'s vagina. While Medina was in M.V.'s bedroom, Blanco entered the room and saw Medina touching M.V. Blanco also noticed that Medina had pulled down his own shorts and that he had an erection.

Blanco kept Medina from leaving the house and notified M.V.'s mother, Franny Blanco, that she needed to return home from work. After Franny arrived, the Blancos called the police, and Medina was arrested.

Medina v. State, No. 49A02-0503-CR-267, slip op. at 2 (Ind. Ct. App. Nov. 23, 2005).

Prior to trial, the State filed a notice of intent to introduce into evidence M.V.'s recorded statement that she gave to a detective approximately four hours after the incident.

The trial court held a hearing on the admissibility of the statement, at which time M.V. testified and was cross-examined. The trial court ruled that M.V.'s recorded statement was admissible because the time, content, and circumstances of the statement supported a finding of reliability.

Two months later, Medina proceeded to trial and was represented by attorney October Kniess. M.V. testified that Medina touched his mouth to her vagina. Kniess did not cross examine M.V., and her recorded pretrial statement was introduced into evidence without objection.

Medina was found guilty as charged and was subsequently sentenced to twenty-five years of incarceration with five years suspended to probation. On appeal, Medina challenged the sufficiency of the evidence, and we affirmed. Id., slip op. at 4.

Thereafter, Medina filed a petition for post-conviction relief, alleging that Kniess was ineffective for failing to object to the admissibility of M.V.'s pretrial recorded statement pursuant to the holding in Crawford. Medina also made a separate claim alleging that Kniess was ineffective for failing to challenge the reliability of the statement. Finally, Medina argued that he was entitled to post-conviction relief because his counsel did not object to leading questions that the deputy prosecutor posed to M.V. on direct examination.

At the post-conviction hearing that commenced on September 18, 2007, Kniess testified that she had practiced law for nearly twenty-four years and that approximately fifteen percent of her practice pertained to criminal matters. Kniess acknowledged that she was "caught off guard" by Medina's trial setting and felt "panic" at the trial. Tr. p. 16, 21.

As a result, Kniess testified that she was “paralyzed” and did not object to the leading nature of the questions posed to M.V. Id. Moreover, Kniess stated that she did not cross-examine M.V. because of her own “unclear” thoughts. Id. at 18-19. Kniess also testified that she was concerned about the reliability of M.V.’s recorded statement because of the period of time that was involved between the discovery of the offense and M.V.’s statement to the police. Additionally, Kniess believed that the pre-trial ruling regarding the admissibility of the statement precluded her from raising the issue again at trial.

Deputy Prosecutor Mark Busby also testified at the post-conviction hearing. Busby testified that he met with Kniess several times before trial and that all of the State’s witnesses, including M.V. were deposed prior to trial by counsel. Busby acknowledged that Kniess made appointments to review the evidence and he believed that Kniess was knowledgeable about the case. Finally, Busby testified that Kniess did not appear surprised, confused, or unaware of the evidence that was presented at trial.

Following the hearing, the post-conviction court denied Medina’s request for relief. Specifically, the post-conviction court determined that there was no basis on which to object to the admission of M.V.’s recorded statement and that the State’s use of leading questions to M.V. was appropriate because M.V. was a child. In relevant part, the post-conviction court’s findings were:

CONCLUSIONS OF LAW

With regard to the admission of M.V.’s statement, the procedures set forth in I.C. 35-37-4-6 were followed by the Court. Medina’s trial record shows no factual variations from the evidence presented at the pretrial hearing that would have caused the Court to reverse its ruling of admissibility had trial

counsel voiced an objection. In addition, Petitioner has not shown that an objection pursuant to Crawford v. Washington . . . would have been sustained. I.C. 35-37-4-6 remained in effect at the time of Medina's trial and to date has been upheld as to nearly identical fact situations as the instant case. See Agilera v. State, 862 N.E.2d 298 (Ind. Ct. App. 2007) (statement made by seven-year-old victim to detective about sexual act committed upon her by defendant did not violate defendant's confrontation clause rights in child molestation trial, where victim was found competent to testify, was made available for cross-examination at the hearing conducted pursuant to IC 35-37-4-6, and did in fact testify at trial). . . . Petitioner has not met his burden as [to] this claim.

Petitioner argues that Ms. Kniess's testimony at the post-conviction hearing as to her internal emotional state during the time of M.V.'s testimony at trial should persuade the Court to find her ineffective. . . . It is a natural human response for any attorney to feel nervous and stressed during an event as important as a jury trial. Ms. Kniess's description in hindsight of her inner feelings during a limited portion of Medina's trial does not persuade this court to discount all that she did do on her client's behalf. The Court's review of the record shows that trial counsel zealously represented Medina's interests.

Along similar lines, Petitioner points to trial counsel's failure to object to four leading questions by the deputy prosecutor during the direct examination of M.V. Petitioner has not met his burden of proving the court would have sustained an objection thereto. Willsey, 698 N.E.2d at 794. This court does not find counsel ineffective for having failed to object to leading questions, and Petitioner cites no authority that a finding otherwise is warranted. The presumption that trial counsel was competent has not been overcome by Petitioner's assertion that Ms. Kniess should have demanded strict compliance with evidentiary rules in the questioning of the child witness. Further, Petitioner points out in his proposed findings that leading questions lessened the impact of M.V.'s trial testimony, as compared to the non-leading questions in the pretrial statement. Medina's ineffective assistance claim on this issue fails.

Appellant's App. p. 46-48. Medina now appeals.

DISCUSSION AND DECISION

I. Standard of Review

We initially observe that a petitioner who has been denied post-conviction relief faces

a “rigorous standard of review” on appeal. Dewitt v. State, 755 N.E.2d 167, 170 (Ind. 2001). The post-conviction court’s denial of relief will be affirmed unless the petitioner shows that the evidence “leads unerringly and unmistakably to a decision opposite” that reached by the post-conviction court. Williams v. State, 706 N.E.2d 149, 154 (Ind. 1999). The petitioner has the burden of establishing the grounds for relief by a preponderance of the evidence. Id. A petitioner who has been denied post-conviction relief is, therefore, in the position of appealing from a negative judgment. Collier v. State, 715 N.E.2d 940, 942 (Ind. Ct. App. 1999). Thus, we will not disturb the denial of relief unless “the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion.” Johnson v. State, 693 N.E.2d 941, 945 (Ind. 1998). We consider only the probative evidence and reasonable inferences therefrom that support the post-conviction court’s determination and will not reweigh the evidence or judge the credibility of the witnesses. Bigler v. State, 732 N.E.2d 191, 194 (Ind. Ct. App. 2000).

We also note that to prevail on a claim of ineffective assistance of counsel, the defendant must establish the two components of the test first set out in Strickland v. Washington, 466 U.S. 668 (1984). Specifically, it must be demonstrated that counsel’s performance was deficient. Smith v. State, 765 N.E.2d 578, 585 (Ind. 2002). This part of the test requires the petitioner to demonstrate that counsel’s representation fell below an objective standard of reasonableness and that counsel’s errors were so serious that they resulted in a denial of the right to counsel guaranteed under the Sixth Amendment of the United States Constitution. McCorker v. State, 797 N.E.2d 257, 267 (Ind. 2003). Moreover,

counsel's performance is evaluated as a whole. Lemond v. State, 878 N.E.2d 384, 391 (Ind. Ct. App. 2007), trans. denied. The court must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. There is a strong presumption that counsel's representation was adequate. Stevens v. State, 770 N.E.2d 739, 746 (Ind. 2002). This presumption can be rebutted only with strong and convincing evidence. Elisea v. State, 777 N.E.2d 46, 50 (Ind. Ct. App. 2002).

To establish the second part of the test, the petitioner must demonstrate that counsel's deficient performance resulted in prejudice to the defendant. Smith, 765 N.E.2d at 585. The petitioner must show that but for counsel's unprofessional errors, there is a reasonable probability that the results of the proceeding would have been different. McCorker, 797 N.E.2d at 267. A reasonable probability for the prejudice requirement is a probability sufficient to undermine confidence in the outcome. Wesley v. State, 788 N.E.2d 1247, 1252 (Ind. 2003).

Finally, we note that this defers to counsel's choice of strategy and tactics. Douglas v. State, 800 N.E.2d 599, 607 (Ind. Ct. App. 2003). Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. Id. Moreover, we need not even evaluate counsel's performance if the defendant suffered no prejudice from that performance, and most ineffective assistance claims can be resolved by a prejudice inquiry alone. Vermillion v. State, 719 N.E.2d 1201, 1208 (Ind. 1999).

II. Medina's Claims

A. Crawford Argument and Reliability

Medina contends that his trial counsel was ineffective for failing to object to the admissibility of M.V.'s recorded statement under Crawford. Moreover, Medina maintains that counsel should have challenged the admission of the statement on reliability grounds when examining the provisions of Indiana Code section 35-37-4-6 (the Protected Persons Statute).

In Crawford, the United States Supreme Court determined that the Sixth Amendment to the United States Constitution prohibits the introduction of testimonial statements in a criminal trial where the defendant had no opportunity to cross-examine the person who made the statements. 541 U.S. at 68-69. However, "when the declarant appears for cross-examination at trial, the confrontation clause places no constraints at all on the use of his prior testimonial statements." Id. at 59 n.9. Therefore, the confrontation clause "does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." Id.

In this case, M.V. was cross-examined at the child hearsay hearing, she was deposed before trial, she testified at trial, and was available for cross-examination at trial. Tr. p. 47-48, 98. In light of these circumstances, there was no violation of the rule announced in Crawford when the trial court admitted M.V.'s pretrial statement into evidence. See Agilera v. State, 862 N.E.2d 298, 306 (Ind. Ct. App. 2007) (finding that the victim's testimonial statements were admissible under Crawford because she was found competent to testify, was

made available for cross-examination, and testified at trial), trans. denied.

In the alternative, Medina argues that his trial counsel was ineffective, as “a hearsay objection should have been sustained because the statement was not sufficiently reliable to be admitted.” Appellant’s Br. p. 12. The Protected Persons Statute provides, in relevant part, that

(e) A statement or videotape described in subsection (d) is admissible in evidence in a criminal action listed in subsection (a) or (b) if, after notice to the defendant of a hearing and of the defendant’s right to be present, all of the following conditions are met:

(1) The court finds, in a hearing:

(A) conducted outside the presence of the jury; and

(B) attended by the protected person;

that the time, content, and circumstances of the statement or videotape provided sufficient indications of reliability.

(2) The protected person;

(A) testifies at the trial;

I.C. § 35-37-4-6.

Considerations in making the reliability determination under the statute include: (1) the time and circumstances of the statement, (2) whether there was significant opportunity for coaching, (3) the nature of the questioning, (4) whether there was a motive to fabricate, (5) the use of age-appropriate terminology, and (6) spontaneity and repetition. Agilera, 862 N.E.2d at 306.

In this case, the evidence established that Detective Dodson interviewed M.V. less than four hours after M.V.’s father discovered the act of molestation. Tr. p. 22, 30. Detective Dodson used open-ended questions with M.V., and the interview was not lengthy.

Appellant's App. p. 69. When responding to Detective Dodson's questions, M.V. used age-appropriate language such as "stuff" and "privates." Id. M.V. did not appear to have been coached, and there was no evidence of any motive on M.V.'s part to fabricate the incident. Id. at 70. In light of these circumstances, the trial court reasonably concluded that the statement was admissible under the Protected Persons Statute. Therefore, Medina has not demonstrated that the trial court would have sustained an objection to M.V.'s statements on reliability grounds, had one been made. Hence, Medina's claim of ineffective assistance of trial counsel on this issue fails. See Jackson v. State, 683 N.E.2d 560, 563 (Ind. 1997) (holding that when a defendant bases an ineffective assistance of counsel claim on counsel's failure to object at trial, the defendant must show that a proper objection, if made, would have been sustained).

B. Leading Questions

Medina next claims that his trial counsel was ineffective for failing to object to the leading questions that the deputy prosecutor asked M.V. on direct examination regarding the incident. As a result, Medina claims that his petition for post-conviction relief should have been granted.

In accordance with Indiana Evidence Rule 611(c):

Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily, leading questions should be permitted on cross-examination. Whenever a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Additionally, our Supreme Court has held that:

Our case law has allowed leading questions on direct examination to develop the testimony of certain kinds of witnesses—for example, children witnesses; young, inexperienced, and frightened witnesses; special education student witnesses; and weak-minded adult witnesses. . . . The use of leading questions is limited in order to prevent the substitution of the language of the attorney for the thoughts of the witness as to material facts in dispute. . . . A leading question is one that suggests to the witness the answer desired.

Williams v. State, 733 N.E.2d 919, 922 (Ind. 2000). Moreover, in King v. State, 508 N.E.2d

1259, 1263 (Ind. 1987), it was observed that

[w]hen a child is a witness, it is permissible for the trial court to allow leading questions, given the varying degrees of comprehension of young people. The trial judge is best able to determine the capabilities of the witness and his decision to permit a certain manner of questioning will not be overturned absent a clear showing of prejudicial error.

As noted above, M.V. was nine years old at the time of the molestation and ten years old when the trial commenced. M.V. spoke both English and Spanish, but chose to testify at trial in Spanish with the aide of an interpreter. Tr. p. 94-95. In our view, M.V.’s young age and her need for an interpreter, which was also apparent in the recorded statement, rendered it appropriate for the deputy prosecutor to ask leading questions during her testimony. Indeed, the trial court, jury, and interpreter were perhaps better able to understand M.V.’s testimony by such straightforward and direct questioning. Moreover, M.V.’s testimony at trial was significantly less probative than the pretrial statement that was admitted at trial. Appellant’s App. p. 79. As a result, Medina has failed to show that an objection to the leading questions would have been sustained had one been made. Therefore, Medina’s ineffective assistance of counsel claim fails.

The judgment of the post-conviction court is affirmed.

RILEY, J., and ROBB, J., concur.